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April 21, 2005

David Lewis
Bureau of Reclamation
2800 Cottage Way, MP-730
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Comments By Clear Creek Community Services District on the Draft Environmental Documents for the CVP Municipal and Industrial Water Shortage Policy

Dear Mr. Lewis:

I serve as general counsel for the Clear Creek Community Services District. Enclosed is a comprehensive mark-up of Reclamation's proposed M&I Shortage Policy, showing at the relevant locations in the document our comments on the Policy and the adequacy of the Draft Environmental Assessment and Draft FONSI to address those portions of the Policy. Some attachments are also included to shed additional light on our comments.

While I would recommend that Reclamation give all of the comments serious consideration, two issues are probably of greatest importance to the District:

- (1) The Draft EA has applied a new “needs analysis” of unknown origin to the District. Not only is the needs analysis arbitrarily imposed, the limitation on the District’s usage of its full contract amount of M&I water violates the District’s contract rights.
- (2) Secondly, the Draft EA and FONSI take no account of future water sales and conversions of AG-to-M&I water as a result of Reclamation’s unilateral conversion of Ag-only contracts to Ag/M&I contracts about 5 years ago. The true effect will be to convert massive amounts of Ag to M&I water throughout the CVP, fueling future urban growth and land use changes. These effects were noted in Reclamation’s 1997 Bookman-Edmonston Engineering report, but are not addressed in the EA or the FONSI. The District is concerned that the curtailment of future Ag water supplies to the District resulting from this Policy, are not accounted for in the environmental review.

Please include these comments in the record of Reclamation's environmental review of the proposed M&I Shortage Policy.

Very truly yours,

LAW OFFICES OF WALTER P. MCNEILL

Walter F. McNeill

WALTER P. MCNEILL

ATTENTION

Encs.
cc: Clients

[illegible]

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 2. Address: **CVP**
 3. City: **00000**
 4. State: **00000**
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DRAFT
Central Valley Project
M&I Water Shortage Policy

<It's a misnomer to refer to this as only an M&I shortage policy. By necessity it also defines Ag shortages. To be accurate "M&I" should be deleted.>

September 11, 2001

The CVP (Central Valley Project) is operated under Federal statutes authorizing the CVP and by the terms and conditions of water rights acquired following California law. During any year, there may occur constraints on the availability of CVP water for an M&I (municipal and industrial) contractor under its contract. Thus, the purposes of this policy are to:

- Define water shortage terms and conditions applicable to all CVP M&I <insert "and Ag"> contractors
- Establish a minimum water supply level that (a) with M&I contractors' drought water conservation measures and other water supplies <Consideration of non-CVP water supplies has the effect of federalizing water management and penalizing development of alternate non-CVP water sources.> would sustain urban areas during droughts, and (b) during severe or continuing droughts would, as much as possible, protect public health and safety
- Provide information to help M&I contractors develop drought contingency plans

Currently, many M&I contractors are not using their full M&I portion of their contract total. <Successive drafts of this policy have become less rather than more informative as to the context in which this policy is adopted. Full disclosure would reveal that the M&I contractors are currently using less than two-thirds of their contract quantities, and thus have a tremendous amount of unused quantity to absorb future growth to the detriment of future Ag water allocations—a factor not considered or analyzed whatsoever in the Draft EA or Draft FONSI.> If the M&I water shortage allocation were applied to full contract entitlements, the resulting allocation for some contractors would exceed their current demand. M&I water demands within the CVP are continually increasing. Therefore, the provision for "75 percent M&I reliability" will be applied to a contractor's *historical use*, with certain adjustments, up to the CVP projected M&I demand as of September 30, 1994. <It is not clear from the Draft EA if Reclamation has retained or abandoned the "historical use" concept. On page 3-11 of the Draft EA it indicates that "Under Alternative 1, allocations would be based upon historical use ..." But Table 3-5 of the Draft EA pertaining to Alternative 1 shows all shortage allocations based upon contract total. If in fact contract total is now the basis for allocations, this is a huge change in the policy that is not analyzed or discussed anywhere in the environmental documents.> Reclamation recognizes that as water conservation measures are implemented there is a hardening of demand that lessens an M&I contractor's ability to reduce demand during shortages.

The capability of the CVP to meet the water supply levels addressed by this policy is subject to the availability of CVP water supplies. M&I water shortage allocation may differ between divisions of the CVP. Generally, the allocation (percentage) to the various divisions will be the same, unless specific operational constraints on Reclamation require otherwise.

Reclamation explored the concept of two tiers of M&I water supply reliability as proposed by contractors in the CVPIA (Central Valley Project Improvement Act) Administrative Proposal on Urban Water Supply Reliability. Although Reclamation determined not to adopt two tiers, it will facilitate the sale of CVP water from willing sellers to M&I contractors when necessary. <This paragraph doesn't have a clear meaning except to suggest that Reclamation will encourage sales of water to M&I contractors. The most common current sales (following the wholesale conversion of the CVP irrigation contracts to dual purpose Irrigation/M&I contracts) and probable future sales are transfers of water from primarily Irrigation contractors to M&I contractors. Reclamation's facilitation of such sales will enhance and accelerate the conversion of land use from raw and/or Ag to urban uses throughout the CVP, and hasten the steep decline of Irrigation water allocations. >

Definitions

Historical use - The average quantity of CVP water put to beneficial use within the service area during the last 3 years of water deliveries, unconstrained by the availability of CVP water. Reclamation and the contractor will negotiate the calculated historical use, to be outlined in a contract exhibit that can be modified during the contract period (but that will not require formal contract amendment). Reclamation recognizes that certain circumstances may require adjustment of the historical use such as growth, extraordinary water conservation measures, or use of non-CVP supplies. Also, Reclamation may agree to adjust the historical use on the basis of unique circumstances. An example of a unique circumstance is the year following a drought year, in which water users are still using extraordinary water conservation measures, or the converse, in which a contractor may use more water than historically used in order to recharge ground water. <Though some flexibility is desirable, the allowance for "unique circumstances" raises more questions than answers, and looks more like a loophole than a guideline. Every contractor feels "unique" in some way. This language will invite competition among contractors and political intrigue to see who can qualify for "unique circumstances. Because there are no standards or guidelines to qualify "unique circumstances," this is an invitation for potentially arbitrary and capricious exceptions with no accountability or predictability for environmental review purposes.>

Adjusted for growth - An adjustment to the contractor's historical use quantity to account for demand increases within the contractor's service area to include (but not be limited to) increases due to population growth and to the number or demand of industrial, commercial, and other entities the contractor serves, provided the contractor provides required documentation to Reclamation.

Adjusted for extraordinary water conservation measures - An adjustment to the contractor's historical use quantity to account for conservation measures that exceed applicable best management practices adopted by the California Urban Water Conservation Council. A water conservation measure considered extraordinary in 2001 may be a mandatory best management practice in 2010 and thus would not be considered extraordinary in 2010.

Adjusted for Non-CVP water - An adjustment to the contractor's historical use quantity to account for water sources other than the CVP used to satisfy M&I demand within the contractor's service area, subject to written documentation from the contractor that shows the extent to which use of the non-CVP water actually reduced the contractor's use of CVP water

in other years. <This has been explained as being intended to avoid disadvantaging contractors who develop alternate non-CVP sources of supply. It is not effective when non-CVP water is much more expensive than CVP water, as is almost always the case. There is no reason to substitute expensive water for less expensive water, and use the expensive water as the base supply. (See comment to term # 8.) ***It is also worth noting that consideration of non-CVP supplies is unique to M&I water as contrasted with Ag water. As a result, Ag water is given a significant preference for use of groundwater and other alternate non-CVP supplies. No policy grounds or justification is given for this disparate treatment of M&I and Ag CVP supplies. Reclamation should not (by implication) regulate non-CVP water, and this should not be part of the shortage policy.>

Public health and safety - M&I uses to which water is allocated consistent with criteria established by the State of California, or as established by Reclamation consistent with criteria applied by similarly situated California M&I water supply entities, as applicable, during declared water shortage emergencies. "Public health and safety" is a difficult and potentially contentious definition. Water Code § 354 provides priority for "domestic use, sanitation, and fire protection." Current Reclamation rule-of-thumb estimate is 50 gallons per capita per day. Some M&I contractors argue for inclusion or "next in line" status for critical industries. Logical arguments can be made for various definitions of the public health and safety level of supply. The issue really is too important to defer till later or pass off to other agencies. This language is not a "definition" at all. The issue may ultimately prove more contentious when an actual decision is required than it would be to fashion a real definition for this policy now. This language should be replaced by a real working definition of public health and safety before a shortage policy is finally adopted. The Draft EA, at p. ES-5, completely defers addressing the issue, stating: However, these quantities are not currently available for use in this analysis but are expected to developed by Reclamation and the contractors."

Consequently the Draft EA and Draft FONSI are not based upon any real analysis at all and cannot provide competent or coherent environmental review. *** Also, this definition and the policy need to be coordinated with the fact that only local agencies—not Reclamation—have the authority to define and declare a "water shortage emergency." (Water Code § 350 et seq.) The definition may have to operate as a minimum Reclamation service level, as opposed to a level below which a "water shortage emergency" is declared. (See comment to term # 7.)

Terms and Conditions

1. Allocation of M&I water will be based on a contractor's historical use of CVP M&I water, adjusted for (a) *growth*, (b) *extraordinary water conservation measures*, and (c) *non-CVP water*, subject to Term and Condition 3. At the contractor's request, Reclamation will consult with the contractor to adjust the contractor's historical use on the basis of (a) *growth*, (b) *extraordinary water conservation measures*, and (c) *use of non-CVP water*. Term and Condition 1 is intended to encourage contractors to use non-CVP water first and rely on CVP water as a supplemental supply. <See comments on non-CVP water definition above; contractors will not invest in the development of non-CVP supplies, knowing that the investment will be made worthless by Reclamation's counteracting withdrawal of equivalent CVP supplies during shortages. > Reclamation will adjust the historical-use calculation to reflect the effect of non-CVP water used in lieu of use of the contractor's CVP water. Crediting for this non-CVP water will be based on 1 acre-foot for 1 acre-foot, unless Reclamation and the contractor agree otherwise in considering

unique circumstances. The contractor must fully document use of non-CVP water to clearly show how much that water use actually reduced the contractor's use of CVP water in other years, and submit the documentation in writing to Reclamation. <Reclamation has yet to explain how this "credit" benefits a contractor, as there is no indication or assurance that the policy will use the "credit" quantity as a basis to provide water during critical water years. Nowhere does this policy promise that a contractor regularly using "X non-CVP water plus Y CVP water" will receive a (for example) 75 % (X+Y) allocation of CVP water in addition to its non-CVP supply during a critical water year. Given Reclamation's promise to provide water at public health and safety levels (term # 7) and the proviso that non-CVP supplies may be considered "at times of extraordinary circumstance"(also in term # 7), then during widespread drought conditions that threaten health and safety levels Reclamation will be compelled to redistribute CVP water from M&I contractors that can get by on non-CVP water to protect the health and safety of contractors who have little or no non-CVP water. As far as I can tell, the contractor gains no protection against shortages by developing new non-CVP supplies, and has no incentive to substitute non-CVP for CVP water. *** The "credit" is actually mathematically detrimental to the CVP supply, because the % reduction taken against the aggregate supply (X+Y) takes out more CVP water off the top than if the % were applied to actual amount of CVP water (Y). >

2. For an M&I contractor to be eligible for the "minimum shortage allocation" of 75 percent of adjusted historical use, the contractor's water service contract must reference that M&I water shortage policy. < Reclamation now interjects this policy as if it were a critical term in the water service contract, created outside of the contract without negotiation. This is an illegal attempt to modify M&I contracts, that carry an absolute right of renewal subject to renegotiation only of specified terms—of which this is not one. Clear Creek CSD has already entered into a long term renewal of the water service portion of its contract, which includes a reference to the M&I shortage policy. However, this does not give Reclamation carte blanche to adopt a policy which contradicts or interferes with the contract terms. The proposed policy would result in a breach of the new long term contract by decreasing and limiting the M&I quantity available to the District under the contract. The District has an unqualified right to 15,300 acre feet of M&I water on the same basis as all other so-called "M&I contractors" who use M&I water exclusively. > In addition, the water service contractor must (a) have developed and be implementing a water conservation plan that meets CVPIA criteria and (b) be measuring such water consistent with section 3405(b) of the CVPIA.. Reclamation intends to incorporate in all new, renewed, and amended water service contracts, a provision that references the CVP M&I water shortage policy. <Reclamation may state its intentions through any news media or general communications it chooses. Reclamation cannot dictate future or existing contract terms through the formulation of a "policy."

3. This M&I water shortage policy applies only to that portion of the CVP water identified as projected M&I demand as of September 30, 1994, as shown for year 2030 on Schedule A-12 of the 1996 Municipal and Industrial Water Rates book and for those contract quantities specified in section 206 of Public law 101-514 Subject to these limitations, except as provided for public health and safety levels (Term and Condition 7), irrigation water transferred or converted to M&I use after September 30, 1994, will be subject to shortage allocation as irrigation water. < According to the Draft EA and Draft FONSI, the preceeding has been replaced by the Water Needs Assessment prepared by Reclamation for the CVP Long-Term Water Service Contract renewal. The Draft EA now shows a "needs assessment" figure of 8,223 acre feet for the District that the District has never seen before ! And this is a reduction from the previous proposed rate book quantity of 10,300 acre feet, to which the District

has also objected during the development of the "shortage policy." The District's needs analysis submitted to Reclamation for the CVP Long-Term Water Service Contract renewal showed future demand for M&I water at 25,068 acre feet. (See attached.) As noted previously, the District has an unqualified right to 15,300 acre feet of M&I water on the same basis as all other so-called "M&I contractors" who use M&I water exclusively. The District's water contract has provided for use of the full amount as M&I water from the commencement of the contracted water service in 1963 and cannot be changed now.

This proposed policy violates the District's contract rights to use of M&I water. There is no legal basis for establishing an arbitrary ceiling on the District's M&I water usage within its existing contract amount. Unlike the M&I contractors who typically have 0% agricultural usage, Clear Creek has a major proportion of Ag usage (about 60%) that may eventually be converted to M&I use, as the district currently provides 100% M&I quality water to all of its customers (including Ag customers). There also is no legal basis for a policy which compels the district to accept two different classes of M&I water—reliable existing M&I supplies and unreliable "converted" M&I supplies from an Ag allocation. The District has been arbitrarily treated differently from all other so-called "M&I contractors" (with exclusively M&I usage), all of whom are given projected needs assessment amounts in excess of their contract quantities.

The use of any ceiling at all in the shortage policy arises only because Reclamation (around the year 2000) arbitrarily, and without any environmental review or consultation, converted all of the Ag-only CVP contracts to joint use Ag/M&I contracts. The purpose of the conversion was to allow Ag contractors to sell their water supplies to M&I contractors, at great profit to the Ag contractors. Without that change of authorized use in the Ag contracts to Ag or M&I, the Ag contractors could not have legally marketed and sold their contract supplies. The creation of a ceiling to define and control the "conversion" of Ag to M&I water was deemed necessary to prevent a wholesale explosion of urban growth fueled by new M&I water supplies. That "ceiling"—designed and created for the new M&I water sellers of the Central Valley—has now been arbitrarily and illegally applied to Clear Creek CSD (which has had a full M&I contract supply for over 40 years).

For CVP water transferred or assigned, a CVP contractor may request that the CVP water so obtained be eligible for M&I reliability. Before Reclamation may approve such a request, the transferee or assignee must fully mitigate any adverse impacts to agricultural water supplies. Further, for CVP water converted, an M&I contractor may request a permanent conversion from an agricultural shortage criteria to M&I shortage criteria, provided there are no adverse impacts to agricultural or other M&I water supply contracts.

4. Before allocation of M&I water to a contractor will be reduced, allocation of irrigation water will be reduced below 75 percent of contract entitlement, as shown here:

Irrigation Allocation	M&I Allocation
100%	100%
95%	100%
90%	100%
85%	100%
80%	100%

75%	100%
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5. When allocation of irrigation water has been reduced below 75 percent and still further water supply reductions are necessary, both the M&I and irrigation allocations will be reduced by the same percentage increment. The M&I allocation will be reduced until it reaches 75 percent of adjusted historical use, and the irrigation allocation will be reduced until it reaches 50 percent of contract entitlement. The M&I allocation will not be further reduced until the irrigation allocation is reduced to below 25 percent of contract entitlement, as shown in the following tabulation.

Irrigation Allocation	M&I Allocation
70%	95%
65%	90%
60%	85%
55%	80%
50%-25%	75%

6. When allocation of irrigation water is reduced below 25 percent of contract entitlement, Reclamation will reassess both the availability of CVP water supply and CVP water demand. Due to limited water supplies, M&I water allocation to contractors may be reduced below 75 percent of adjusted historical use. < This table stops at the 25/75 level. Table 3-5 in the Draft EA continues and goes down to 0/50. That is a significant proposed change in the Policy itself. A major deficiency in the Draft EA and Draft FONSI is that Reclamation has not produced a reviewable version of the proposed Policy that incorporates and shows all of the new terms, whatever those may be. >

7. Reclamation will deliver CVP water to an M&I contractor at not less than a *public health and safety* level, provided CVP water is available <Is water "available" if it is also needed for environmental purposes or some other urgent need? If public health and safety has the top priority, there ought to be a statement to that effect in this policy.>, if (a) the Governor declares an emergency due to water shortage applicable to that contractor or (b) Reclamation, in consultation with the contractor, determines that an emergency exists due to water shortage. <Reclamation puts itself in the position of determining whether the contractor is experiencing a water shortage emergency. By State law (Water Code § 350 et. seq.) the contractor has the sole legal responsibility to decide whether to declare a water shortage emergency and how to administer the emergency. This is a legal duty that cannot be contracted or delegated away.> The contractor will calculate the public health and safety level using criteria developed by the State of California and submit the calculated level to Reclamation along with adequate support documentation for review. < Does "review" mean merely for information purposes or for the purpose of approval? Even though the level is "set by the contractor," past experience indicates that "review" also means "approval."> If State criteria do not exist, the contractor will apply criteria developed by Reclamation <Again this is a potential conflict with the contractor's duty under State law to determine the existence of a water shortage emergency.> (in consultation with the contractor) that will be consistent with relevant criteria used by similarly situated California M&I water entities. Reclamation will provide a water supply at the public health and safety level to all CVP M&I contractors, including contractors with allocation of irrigation water transferred or converted to M&I use after September 30, 1994. < This is where Reclamation's

environmental review is totally deficient. Sales of what was formerly restricted as Ag water for use as M&I water, sold by newly minted joint-use contractors (formerly Ag-only contractors) to M&I contractors for expanded M&I usage, are not contained or controlled by this Policy. Once the water is sold and "converted" to M&I use it then carries a "floor" of M&I "health and safety" reliability. That floor can be as high as 90% for sensitive industrial uses. An accurate assessment of the effect of the "floor" is impossible, since Reclamation has deferred making a specific determination or definition of "health and safety" levels. Regardless of the precise levels that could or might be established, there is no limitation on converted Ag-to-M&I water as a proportion of overall CVP water usage. In other words, **Ag water will be permanently converted to M&I usage as a growing percentage of all CVP water deliveries, as a direct result of this Policy.** The environmental impacts are enormous and unaccounted for in the Draft EA and the Draft FONSI. Further, the impacts are more dramatic in some regions of the CVP than others. The attached copy of selected portions of the Bookman-Edmonston Engineering report (1997) titled "Urban Reliability Policy Impact Analysis" (prepared for Reclamation) provides a substantially accurate analysis of the currently proposed Policy. It shows that in the CVP Operations Office Group "North of the Delta" the "shortage impact" on Irrigation (Ag) contractors will ultimately increase to 30.8% from 5.2%, at the 55% shortage level, as a result of implementation of the shortage Policy. Plainly stated, contrary to the findings in the Draft FONSI, there will be a massive and permanent shift of Ag to M&I water usage, providing water for growth and changes in land use. At times of extraordinary circumstance, Reclamation may determine that is necessary to vary the allocation of M&I water among contractors, taking into consideration a contractor's available non-CVP water. <This is what really penalizes contractors who develop expensive non-CVP water supplies to use either as supplemental water in regular water years or for emergency use in severe drought conditions. If a contractor and its customers make a huge financial investment in developing a supplemental non-CVP supply for emergency use, Reclamation may force the contractor to use its non-CVP supply as a replacement for its CVP water, and redistribute that CVP water to other contractors who need it to maintain health and safety levels. The contractor completely loses the value of the investment in new non-CVP supplies. The risk of redistribution by Reclamation makes it impossible to justify the investment in the first place. ***

This provision also "federalizes" local water management at the individual district level. Whereas water districts currently seek out a variety of water sources, if they can, to enhance reliability and quantity, Reclamation would now step in and become the determining factor during drought conditions. Centralized command and control of local water management by Reclamation is inappropriate, inefficient, and beyond the resource capability of Reclamation to administer.

8. Each M&I contractor will provide to Reclamation its drought contingency plan designed to protect public health and safety. The contractor may provide a copy of its Urban Water Management Plan (UWMP) or water conservation plan (WCP) to Reclamation in lieu of a separate drought contingency plan so long as the UWMP or WCP contains the contractor's drought contingency plan.